Swyear Amusements, Inc. *and* Comite De Apoyo A Los Trabajadores Agricolas (CATA). Case 01–CA–130018

February 9, 2021

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL AND RING

The General Counsel seeks summary judgment in this compliance proceeding on the basis that the Respondent's answers to the compliance specification are insufficient under the Board's Rules and Regulations. We agree and grant the General Counsel's Motion for Summary Judgment.[1]

On December 28, 2017, the National Labor Relations Board issued a Decision and Order in this proceeding, approving the parties' Formal Settlement Stipulation providing for a consent order that the Respondent, Swyear Amusements, Inc., violated Section 8(a)(3), (2), and (1) of the National Labor Relations Act by giving unlawful assistance to the Association of Mobile Entertainment Workers (AMEW), unlawfully recognizing it as the representative of its H-2B foreign worker carnival employees, and unlawfully entering into a collective-bargaining agreement covering those employees without their majority support.[2] The Board ordered that the Respondent make whole its H-2B employees employed during the 2014 carnival season as a result of its unlawful recognition of AMEW.[3]

On February 21, 2020,[4] a controversy having arisen over the amount of backpay owing by the Respondent under the Board's Order, the Acting Regional Director for Region 1 issued a compliance specification and notice of hearing alleging the amounts owed under the Board's Order, and notifying the Respondent of its obligation to file a timely answer complying with the Board's Rules and Regulations. The Respondent filed a timely answer on March 13.

On March 25, the General Counsel advised the Respondent that its answer did not satisfy the standards set forth in Section 102.56(b) of the Board's Rules and Regulations. The General Counsel further advised that if the Respondent did not file an amended answer by April 1, he would file a motion to strike and for summary judgment in whole or in part. On April 1, the Respondent filed its amended answer to the compliance specification, admitting in part and denying in part the allegations in the specification.

On June 17, the General Counsel filed with the Board a motion to strike Respondent's answers to paragraphs 1 through 6 and 9 through 11 of the compliance specification and for Summary Judgment, with exhibits attached. On August 3, the Board issued an Order Transferring the Proceeding to the Board and Notice to Show Cause why the motion should not be granted. On September 20, the Respondent filed an opposition to the motion and response to the notice to show cause.[5] On September 22, the General Counsel filed a reply to the Respondent's opposition.

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

Sections 102.56(b) and (c) of the Board's Rules and Regulations provide as follows:

> (b) *Form and contents of answer*. The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.
>
> (c) *Failure to answer or to plead specifically and in detail to backpay allegations of specification.* If the Respondent fails to file any answer to the specification

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] *JKJ Workforce Agency, Inc.*, 01–CA–129948, 2017 WL 6729350.

[3] In a widespread unlawful scheme, Swyear Amusements was one of 34 respondents in the underlying proceeding found to have violated the Act and subject to the Board's Order.

[4] All dates are in 2020 unless otherwise noted.

[5] The Respondent argues that the Board lacks jurisdiction over this matter under the parties' settlement. The Board's December 28, 2017 Decision and Order expressly retains compliance jurisdiction.

> within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

The compliance specification at issue here sets forth and applies a formula for calculating the amounts owed by the Respondent to its 2014 H-2B carnival employees as a result of the Respondent's entering into an unlawful collective-bargaining agreement. The Respondent employed the carnival workers pursuant to the H-2B visa program permitting temporary employment of foreign workers in the United States.[6] The H-2B program mandates payment of prevailing wages to H-2B foreign workers absent a lawful collective-bargaining agreement negotiated at arms' length.[7] In the unfair labor practice case, the Respondent conceded, and the Board found, that the collective-bargaining agreement was the unlawful product of the Respondent's impermissible assistance to and recognition of a non-majority union. The Respondent's unlawful collective-bargaining agreement therefore cannot constitute a bona fide agreement that satisfies the requirements of the H-2B visa program for payment of contractual wages in lieu of prevailing wages.[8] Consequently, the compliance specification alleges that the backpay owed by the Respondent to its H-2B carnival employees is measured by the difference between the unlawful contractual rate it paid them and the required prevailing wages. The Respondent offers no alternative compliance methodology as required by Section 102.56.[9]

The Respondent nevertheless generally denies the key allegations of the compliance specification. These allegations, set forth in paragraphs 1 through 6 and 9 through 11, include the number of carnival shows worked by the H-2B employees, the dates of those shows, the hours worked on each day, the start and end work dates for the employees, the total number of hours worked at each carnival location to be paid at prevailing wage straight time and at prevailing wage overtime, the employees' interim earnings under the unlawful collective-bargaining agreement, and gross and net backpay owed. However, the Respondent has failed to support its denials with specific alternative formulas for computing backpay, supporting figures for the hours worked or amounts owed, or alternative calculations.[10]

As the Board has recognized,

> It is well settled that a respondent's general denial of the backpay computations contained in a compliance specification will be deemed insufficient if the answer fails to specify the basis for the disagreement with the backpay computations contained in the specification, fails to offer any alternative formula for computing backpay, fails to furnish appropriate supporting figures for amounts owed, or fails adequately to explain any failure to do so.

Mining Specialists, Inc., 330 NLRB 99, 101 (1999); accord *Michael Cetta, Inc. d/b/a Sparks Restaurant*, 370 NLRB No. 46, slip op. at 2 (2020) (collecting cases). We agree with the General Counsel that the Respondent's answers[11]

[6] See 20 CFR § 655 et seq. The majority of employees were Mexican nationals.

[7] 20 CFR § 655.10 provides in pertinent part as follows:

> § 655.10 Determination of prevailing wage for temporary labor certification purposes.
>
> **(b)** *Determinations.* Prevailing wages shall be determined as follows:
>
> **(1)** [I]f the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the "prevailing wage" for labor certification purposes.
>
> **(2)** If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean of the wages of workers similarly employed in the area of intended employment using the wage component of the BLS Occupational Employment Statistics Survey (OES)[.]

[8] Indeed, the unlawful collective-bargaining agreement has been dissolved pursuant to the parties' settlement.

[9] The General Counsel's uncontested method of calculating backpay owed is reasonable. See *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982).

[10] For example, the Respondent denies the number and dates of carnivals worked, but it does not dispute that it performed any specific show(s). It denies the start and end work dates for the carnival employees but presents no alternate work dates. Its denial that it employed the carnival employees named in the compliance specification is entirely unsubstantiated. It denies that employees worked 12 hours a day each day there was a work location scheduled, again without substantiation, claiming only that "work hours varied by location." It denies the prevailing wage rates alleged without setting forth any alternative figures. It denies the wages paid pursuant to the unlawful collective-bargaining agreement but presents no alternatives and does not substantiate its claim of additional compensation.

[11] We have also considered the Respondent's opposition to the General Counsel's motion.

amount to a general denial, which cannot withstand summary judgment under the established criteria set forth in Section 102.56 of the Board's Rules and Regulations.

The Respondent seeks to legitimate its general denials based on its asserted lack of employment records, citing its owner's medical treatment, and further claiming without support that it is exempt from record-keeping obligations. The Respondent's blanket claim of illness fails to assert a sufficient basis for excusing its deficient answers in this case. The Respondent fails to explain the duration of the owner's condition, or why its wage and employment records, which pertain to matters within the Respondent's knowledge,[12] are beyond the reach of its other employees, agents, or counsel. The Respondent does not explain why it does not possess the records or cite any efforts it made to obtain them.[13] Regarding its record-keeping obligation, contrary to the arguments made by the Respondent, we note that the Respondent was subject to a 3-year record-keeping obligation under the H-2B program_contemporaneous with the inception of the NLRB proceedings.[14] Further, the Respondent ignores that it has been subject to the Board's record-keeping Order since the Board issued its underlying decision in this proceeding on December 28, 2017.[15] The Respondent's asserted lack of records cannot constitute an adequate explanation for its failure to answer the allegations in the compliance specification as prescribed by the Board's rules.

We reject as meritless the Respondent's argument that it owes zero backpay because it is a seasonal amusement company exempt from the Fair Labor Standards Act (FLSA), 29 U.S.C. 203 et seq.[16] This argument fails because backpay liability here does not arise from the FLSA. It arises from the Respondent entering into an unlawful collective-bargaining agreement under the NLRA, and is measured by the prevailing wages required under 20 CFR § 655.10(b)(2) where, as here, there is no lawful collective-bargaining agreement. This predicate for liability and concomitant measurement for determining backpay attach even if the Respondent were exempt from the FLSA.

In any event, the Respondent has not presented a scintilla of evidence in support of its conclusory assertion that it meets the FLSA exemption requirements for a seasonal amusement company. The Respondent's argument is entirely unsupported and is patently insufficient to defeat summary judgment under Section 102.56 of the Board's Rules and Regulations. See, e.g., *Ornamental Iron Works Co*, 307 NLRB 20 (1992) (respondent's answer that no backpay due because of offers of reinstatement insufficient to defeat summary judgment because respondent did not specify any details about the offers and did not document the offer letters).

Because the Respondent has failed to deny the allegations in paragraphs 1 through 6 and 9 through 11 of the compliance specification as prescribed in Section 102.56(b) of the Board's Rules, and its failure to do so has not been adequately explained, we deem those allegations to be admitted as true under Section 102.56(c). Accordingly, we grant the General Counsel's Motion for Summary Judgment and to Strike as to the allegations in each such paragraph. See *Michael Cetta, Inc. d/b/a Sparks Restaurant*, supra, 370 NLRB No. 46, slip op. at 2; *Flaum Appetizing Corp.*, 357 NLRB 2006, 2007 (2011); *Ybarra Construction Co.*, 347 NLRB 856, 857 (2006); *Paolicelli*, 335 NLRB 881, 883 (2001). The Respondent has admitted the remaining paragraphs of the compliance specification. We therefore conclude that the amounts due are as set forth in the compliance specification, and we will order the Respondents to pay these amounts, plus interest accrued to the date of payment.

ORDER

The National Labor Relations Board orders that the Respondent, Swyear Amusements, Inc., New Athens, Illinois, its officers, agents, successors, and assigns, shall

(a) Make whole the individuals named below by paying them the amount following their names, plus interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus withholdings required by Federal and State laws.

Borges Tzab, Jose	$10,541

[12] See, e.g., *Michael Cetta, Inc. d/b/a Sparks Restaurant*, supra, slip op. at 2; *Baumgardner Co.*, 298 NLRB 26, 27 (1990), enfd. 972 F.2d 1332 (3d Cir. 1992); *Denart Coal Co.,* 301 NLRB 391, 392 (1991); S*chnabel Associates,* 286 NLRB 630, 631 (1987).

[13] If such information is not in its possession, a respondent is required to make an effort to locate it from other sources. See S*chnabel Associates*, supra at 631.

[14] See 20 CFR § 655.56. The underlying unfair labor practice charges were filed against the Respondent in December 2014.

[15] The Board ordered that the Respondent, in lieu of production of documents, "may produce . . . a sworn statement, notarized or signed under penalty of perjury, affirming . . . "if accurate, that [it does] not possess, and did not maintain, any records of hours worked by [its] employees during the 2014 season." *JKJ Workforce Agency*, supra, slip op. at 10. The Respondent does not claim, and the record does not show, that it complied with the Board's Order in this regard.

[16] 29 U.S.C. 213(a)(3) exempts from Secs. 206 and 207 of the FLSA
> (3) any employee employed by an establishment which is an amusement or recreational establishment . . . if
> (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year[.]

Cutz Couoh, Ricardo	$10,541
Flores Calleja, Marciano	$10,541
Herrera Segura, Rafael	$10,541
Madrid Galicia, Jhair	$10,541
Mendez Corona, Maria	$10,541
Pereanez Bastian, Oscar	$10,541
Rendon Perdomo, Jovita	$10,541
Rodriguez Santiago, Jesus	$10,541
Tzab Borges, Gabriel	$10,541
Ventura Arallano, Amalia	$10,541
Cruz Dzul, Maria	$10,403
Dzul Pina, Glendi	$10,403
Guzman Landa, Gaudenci	$10,403
Hernandez Luna, Laurencio	$10,403
Hernandez Sanchez, Juana	10,403
Lucas Julian, Antonio	$10,403
Mendoza, Reymundo	$10,403
Ramirez Hernandez, Eligio	$10,403
Guevara Reyes, Erika	$10,075
Borgues Dzib, Manuel	$8,669
Flores Calleja, Ambrosio	$8,669
Garcia Salamanca, Martin	$8,669
Hernandez Alarcon, Porfirio de Jesus	$8,669
Munoz Garcia, Elit	$8,669
Murrieta Murrieta, Rodolfo	$8,669
Pereanez Ortega, Jonathan	$8,669
Martinez Campos, David Enrique	$8,502
Mendez Montiel, Jesus	$8,502
Quijano Gutierrez, Jose Alfonso	$8,502
Tejeda Hernandez, Paulino	$8,502
Altamirano Mota, Suleyma	$8,169
Benavides Aburto, Alma Rose	$8,169
Rendon Mendez, Ana Maria	$8,169
Rodriquez Salazary, Francisca	$8,169
Torres Hernandez, Marie del Carmen	$8,169
Trujillo Ramirez, Delfina	$8,169
Tzab Borges, Jesus	$8,169
Hernandez, Ricardo	$7,134
Quijano Mendoza, Josefina	$6,281
Quirino Monfil, Abigail	$6,281
Martinez, Candelerio	$2,992

(b) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 9, 2021

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Lauren McFerran, Chairman

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William J. Emanuel, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD